

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
LUJ, Inc. (Assignor))	
)	
and)	
)	
Long Nine, Inc. (Assignee))	File No. BALH-20010111ABJ
)	
For Assignment of License of Station)	Facility ID No. 56229
WYVR(FM), ¹ Petersburg, Illinois)	

MEMORANDUM OPINION AND ORDER

Adopted: August 15, 2002

Released: August 22, 2002

By the Commission:

1. The Commission has before it the Petition for Reconsideration of Saga Communications of Illinois, Inc. ("Saga") dated August 31, 2001, directed to the July 27, 2001, action of the Chief, Audio Services Division, Mass Media Bureau, denying Saga's February 26, 2001, Petition to Deny and granting the above-referenced application to assign the license of station WYVR(FM), Petersburg, Illinois, from LUJ, Inc. ("LUJ") to Long Nine, Inc. ("Long Nine").² Also on file are the respective Oppositions filed September 13, 2001, by LUJ and Long Nine, and Saga's September 25, 2001, Consolidated Reply.

2. In denying Saga's Petition to Deny, the staff rejected Saga's false certification allegation.³ Specifically, Saga maintained that Long Nine and LUJ falsely certified that the underlying Asset Purchase Agreement ("Agreement") was complete as filed because the application omitted, without explanation, all of the Agreement's schedules. Saga asserted that the omission was "material" and that both LUJ's and

¹ The station's call sign was changed from WLUI(FM) to WLGM(FM) on August 10, 2001, and to WYVR(FM) on February 12, 2002.

² The Media Bureau referred this matter to us for consideration pursuant to Section 1.106(a)(1) of the Commission's Rules, 47 C.F.R. § 1.106(a)(1).

³ Saga's Petition to Deny was denied on several grounds. Saga seeks reconsideration only on the false certification issue.

Long Nine's respective certifications in Item 3⁴ and Item 1⁵ were false, raising a basic character qualification issue regarding their truthfulness and reliability.

3. There is no dispute that LUJ and Long Nine certified that the filed agreement was "complete" and complied "fully with the Commission's rules and policies," and that they had answered each question based on their review of the application Instructions and worksheets. The staff noted, however, Long Nine's statement in its Opposition to the Petition to Deny that the omitted schedules contained proprietary and other information not germane to the subject application, and there was nothing in the record to dispute Long Nine's claim. Moreover, the staff stated that the Agreement as submitted provided all relevant information necessary for examination of the subject transaction, including the sales price and pertinent material terms of the transaction. On this basis, the staff concluded that it could fully process and grant the application as being in the public interest without review of the omitted schedules and exhibits, citing *Univision Holdings, Inc.*⁶ The staff then found that Saga had failed to raise a substantial and material question of fact concerning the accuracy of the applicants' certifications and Long Nine's qualifications to be a Commission licensee.

4. In support of its Petition for Reconsideration, Saga asserts that the staff erred in rejecting its false certification argument. Saga argues that the applicants' affirmative certifications presuppose that they reviewed and adhered to the subject application's Instructions and worksheets. The Instructions to the Assignor's Section of FCC Form 314 require the submission of "a *complete* and final copy of the unredacted contract . . . *including all exhibits and attachments*" (emphasis added), which was not done in this case. Saga asserts that the Instructions "for the Assignee contain a similar requirement with respect to its Question 3." Hence, Saga reiterates that applicants' failure to submit "all" the exhibits and attachments renders their respective certifications "false on their face" and "incomplete in material respects," and that the assignment application should be denied. Saga also suggests that the staff's

⁴ The Commission's FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License, asks the Assignor to certify that:

- (a) it has placed in its public inspection file(s) and submitted to the Commission copies of all agreements for the sale of the station(s);
- (b) these documents embody the complete and final understanding between licensee/permittee and assignee; and
- (c) these agreements comply fully with the Commission's rules and policies.

See FCC Form 314, Section II, Item 3 (Assignor). Similarly, Section III, Item 3 (Assignee) asks the Assignee to certify that the submitted documents "embody the complete and final agreement" and "comply fully with the Commission's rules and policies." In this case, both the Assignor and Assignee responded "Yes" to Item 3. FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License, asks the licensee/permittee and transferee to make similar certifications. FCC Form 316, Application for Consent To Assign Broadcast Construction Permit or License or Transfer of Control of Entity Holding Broadcast Station Construction Permit or License, also requires the Assignor/Transferor and the Assignee/Transferee to make similar certifications.

⁵ Saga argues that the false Item 3 certifications (*see supra* note 4) render false the certifications by LUJ and Long Nine in Item 1 of Section II (Assignor) and Section III (Assignee), respectively. Item 1 asks each applicant to certify that it has reviewed the application, worksheets, and Instructions and that each of its certifications represents an accurate response based on those materials.

⁶ *Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6675 (1992). The staff retains the right to request omitted materials if appropriate. *Id.* See also 47 C.F.R. § 73.3514.

reliance on *Univision* is misplaced because the Instructions to the subject application are dated April 2001 and thus supercede the 1992 *Univision* case.

5. We affirm the staff's decision to grant the assignment application, but we clarify the reasoning that leads to this result. We conclude that LUI's and Long Nine's subject certifications were in fact false. We do not find, however, that the evidence presented by Saga or the record as a whole is sufficient to raise a substantial and material question as to whether LUI or Long Nine intended to deceive the Commission by making a false certification. An intent to deceive is a necessary component of a finding of misrepresentation or lack of candor that would underlie a challenge to an applicant's basic qualifications.⁷ There is nothing in the record to contradict Long Nine's assertion that the omitted schedules contain proprietary information that is not germane to the subject application, or that the omitted material does not constitute a separate or additional agreement.⁸ The documentation that was submitted provided all relevant information necessary for examination of the subject transaction, including the sales price and other pertinent material terms of the transaction. Neither the Commission nor Saga and other prospective petitioners were, therefore, deprived of access to information relevant to the disposition of this case. Thus, there is no apparent motive from which we might infer an intent to deceive, and there is no direct evidence of any such intent. We conclude that the staff's determination that Saga failed to raise a substantial and material question concerning LUI's and Long Nine's basic qualifications to be Commission licensees was appropriate, and thus we affirm it.

6. Additionally, on reconsideration, we address the fact that it has been longstanding staff practice to accept assignment and transfer of control applications containing sales contracts that omit schedules and exhibits that are not material to our review. While we acknowledge this staff practice, we also note that when the Commission modified the assignment and transfer of control forms in connection with its 1998 Biennial Regulatory Review "Streamlining" Order,⁹ it revised the assignment and transfer of control application forms and processes "to ensure easy public access to sales agreements and contracts previously reviewed by the staff."¹⁰ Consistent with this intent of ensuring public access, the Instructions were revised to direct assignment/transfer applicants to submit with the application, which is placed in the Commission's Reference Information Center and the station's public inspection file to facilitate public review, "a complete and final copy of the unredacted contract for the sale of the authorizations . . . , including all exhibits and attachments."¹¹ We believe that the wording of the certifications (for both the Assignor/Transferor/Licensee and Assignee/Transferee) taken together with the Instructions in Forms

⁷ See *Liberty Productions, A Limited Partnership*, 16 FCC Rcd 12061, 12079-80 (2001) (in determining the merits of a false certification issue, substantial evidence of an intent to deceive is necessary to support a finding of misrepresentation or otherwise raise a question as to the basic qualifications of an applicant); *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992), *review denied*, 7 FCC Rcd 7996 (1992) (disqualification for false certification not warranted unless the applicant intended to deceive the Commission).

⁸ See, e.g., *Abundant Life, Inc.*, 16 FCC Rcd 4972 (2001), *appeal dismissed sub nom. Unity Broadcasters v. FCC*, Case No. 01-1148 (D.C. Cir. 2002) (*per curiam*) (evidence submitted in support of the accuracy and candor of a certification may fully resolve any questions concerning that certification).

⁹ *Report and Order*, 13 FCC Rcd 23,056 (1998) ("1998 Streamlining Order").

¹⁰ *1998 Streamlining Order*, 13 FCC Rcd at 23075 ¶ 40.

¹¹ *Id.* at 23170, 23190 (Instructions to FCC Forms 314 and 315 provided in Appendix D).

314, 315 and 316 as well make clear that unless the complete, final and unredacted agreement is being submitted, including all exhibits, schedules and attachments, neither the Assignor/Transferor/Licensee nor the Assignee/Transferee may make the affirmative certification. Accordingly, on reconsideration, we admonish LUJ and Long Nine for falsely responding “Yes” to Items 3 and 1 of the application.

7. We recognize that certain schedules, exhibits and other contract attachments may not be material to the Commission’s review of a particular transaction and may, moreover, contain proprietary information.¹² We conclude that a failure, by itself, to submit such documents is neither a material omission (that would otherwise be cause for not accepting and processing an application) nor grounds for finding that a particular transaction is not in the public interest.¹³ This, however, puts the requirements established by our Instructions and certifications at odds with what is normally necessary for our evaluation of a particular transaction. We therefore also conclude that contract submission requirements should be relaxed to permit applicants to exclude non-material contract attachments. We are directing the staff to revise the Instructions and relevant certification language in our assignment and transfer of control application forms accordingly.

8. In the interim, we hereby instruct the staff to issue an appropriate Public Notice, concurrently with release of this *Memorandum Opinion and Order*, setting forth the filing and certification procedures to be followed until the revised Forms are issued. Namely, the applicable certification in each application should accurately reflect the completeness of the parties’ submission for that application in light of the Instructions as presently worded. Consistent with our findings in Paragraph 6 herein, applicants that submit complete and final copies of *all* transaction documents may continue to respond “Yes” to the applicable certification Item. Applicants -- both Assignors/Transferors/Licensees and Assignees/Transferees alike -- that choose to omit transaction documents which contain information that is not material for Commission processing purposes, whether such information is proprietary or not, must respond “No” to the applicable certification Item.¹⁴ They should also in that case submit an Exhibit describing each of the omitted documents, stating both the specific reason(s) for omitting them and the basis upon which the applicants contend that the omitted documents are not material to the Commission’s consideration of the subject application.¹⁵ We believe that such explicit reference to any omitted schedules, exhibits, or other related documents will enable both the public and the Commission to determine whether any such documents should in fact be submitted.¹⁶

9. Finally, although not at issue in this case, we caution applicants that the failure to submit documentation that contains all material terms of an agreement for the assignment or transfer of control of

¹² Examples of documents that normally would not be material to Commission processing of the application are employee benefit plans and lists of vendor supply contracts being assumed by the buyer.

¹³ Of course, as noted above (*see supra* note 6), the staff retains the right to request omitted information if necessary or appropriate to evaluation of the proposed transaction.

¹⁴ In Form 314, for example, the applicable item is Item 3 for both the Assignor and Assignee. A “No” response to this Item, however, would not preclude the applicant from responding “Yes” to Item 1 of Form 314 (*see supra* note 5) or its analog in Forms 315 and 316.

¹⁵ Many applicants now follow the practice of responding “No” to Item 3 of Form 314 (or its analog in Forms 315 and 316) when all the transaction documents are not submitted.

¹⁶ *See supra* note 6.

a broadcast authorization, including the sales price, will delay processing of the application and may result in the Bureau providing the public with an additional thirty-day period, following the submission of all such documentation, for the filing of petitions to deny.

10. In light of the above discussion, we find that Saga has not shown that the staff erred in deciding to grant the assignment application. Accordingly, Saga's Petition for Reconsideration IS GRANTED TO THE EXTENT INDICATED HEREIN AND IS DENIED IN ALL OTHER RESPECTS.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary